(4)

No. 88-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL COAL ASSOCIATION AND
ALABAMA POWER CO., *et.al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in remanding a "grandfather" exemption contained in regulations promulgated by the Environmental Protection Agency under Section 123 of the Clean Air Act, 42 U.S.C. § 7423 (1982), on the ground that EPA's exemption did not conform to judicially-formulated criteria for such exemptions?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.1a-64a) is reported at 838 F.2d 1224.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. The petition for a writ of certiorari was filed on July 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1982).

STATEMENT

For the second time in four years, Alabama Power Co. and a number of other electric utility companies[1] ask this Court to review a decision of the U. S. Court of Appeals for the D.C. Circuit holding that the U.S. Environmental Protection Agency ("EPA") has acted in an arbitrary and capricious manner in implementing §123 of the Clean Air Act, 42 U.S.C. § 7423 (1982).

Section 123 of the Act directs EPA to adopt regulations restricting the use of tall smokestacks as a means of achieving the Act's air quality objectives.[2] In *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983) ("*Sierra Club*"), the court decided, *inter alia*, that EPA's 1982 §123 rules were arbitrary and capricious as applied to existing pollution sources that had increased the height of their original stacks.[3] Alabama Power sought review by this Court of this and other rulings in *Sierra Club* but its petition was denied.[4]

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[1] Petitioners National Coal Association and Alabama Power Co., *et al.* (hereinafter "Alabama Power").

[2] Tall smokestacks and other dispersion techniques reduce air pollutant concentrations at ground level by diluting contaminants in greater quantities of air rather than by reducing the quantity of contaminants released from the pollution source. Section 123 implements the congressional policy designating reduction in the release of contaminants as the preferred method of achieving the Act's air quality objectives.

[3] As is discussed more fully below, the court in *Sierra Club* held that EPA was arbitrary and capricious in allowing sources that had increased their original stack heights to take credit for the taller stacks based on an historical formula since that formula, as applied to such "stack-height-increase" sources, had not been shown to be consistent with the statute's "good engineering practice" ("GEP") limits on stack height credit. The court remanded to EPA to either require case-by-case demonstrations for such sources, to develop an alternative, more restrictive formula, or to show that the historical formula was consistent with the statutory GEP limitation. See pp. 4-5, *infra*.

[4] Alabama Power Co. v. Sierra Club, 468 U.S. 1204 (1984).

On remand following *Sierra Club* EPA adopted a rule that is identical to its 1982 rule as applied to sources that increased the height of their original stacks prior to the 1983 *Sierra Club* decision. EPA defended this response with a "grandfathering" rationale. The D.C. Circuit again remanded EPA's rule as applied to these sources, holding that EPA's new rationale was not justified under applicable case law.

Despite this Court's 1984 denial of certiorari, Alabama Power again requests this Court to review the D.C. Circuit's remand of the Agency's rule as applied to sources increasing their original stack heights.

The issues presented by the D.C. Circuit's 1988 remand of this portion of EPA's rule are no more worthy of review than they were when review was denied in 1984. Indeed, they are less worthy, since the only question presented by the instant petition is the whether EPA adequately responded to the 1983 *Sierra Club* remand.

I. THE REQUIREMENTS OF SECTION 123.

In relevant part § 123 restricts reliance on physical stack height in meeting the Act's air quality requirements. Under §123 a source may not take account of stack height that exceeds "good engineering practice" ("GEP"). Section 123(c) defines GEP as the "height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant ... as a result of atmospheric downwash, eddies and wakes ...."[5] The section specifies a height of "two and a half times the height of such source" as the upper limit for any general definition of GEP but authorizes EPA to permit greater heights for individual sources based on case-by-case demonstrations of need. *Id.*

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[5] Downwash, eddies and wakes are terms describing turbulent air conditions that can occur immediately downwind of buildings and other large obstacles.

Section 123 provides that its restrictions apply to all stack heights not in existence before the date of enactment of the Clean Air Amendments of 1970 (December 31, 1970). §123(a).[6]

II. JUDICIAL REVIEW OF EPA'S RULES.

In *Sierra Club* the Sierra Club and other petitioners and intervenors[7] challenged, *inter alia*, EPA's 1982 definition of GEP stack height as applied to sources that increased the height of their original stacks. 719 F.2d at 456. EPA's 1982 rule defined GEP for such sources based on automatic use of an historical formula of two and one-half times the height of the source. ("2.5H").[8] For stacks built after 1979 EPA's rule specified a slight variant of the 2.5H formula.[9] (Hereinafter, these two variants will be referred to collectively as the "2.5H formula.")

The Sierra Club, *et al.*, argued that the Act did not permit EPA to define GEP as automatically equal to the 2.5H formula for sources that increased their original stack heights and that the Agency's use of this formula for such sources was arbitrary and

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[6] There is one narrow exception to the 1970 "grandfather" date: coal-fired electric plants subject to §118 of the Act that began operation prior to 1957 and awarded contracts for a taller stack before February 8, 1974 may take account of their entire stack height. This provision was drafted to exempt a single plant located in Tennessee. *Sierra Club*, 719 F. 2d at 465.

[7] Parties aligned with the Sierra Club were the Natural Resources Defense Council, the Commonwealth of Pennsylvania, the State of New York, the Commonwealth of Massachusetts, the State of Vermont, the State of Rhode Island and the State of New Hampshire.

[8] 47 Fed. Reg. 5868 (1982); set forth as 40 CFR §51.1(ii)(2).

[9] The formula for post-1979 stacks is the height of the source plus 1.5 times the lesser of the source's height or width (H+1.5L). As can be seen, this formula equals 2.5H for any source whose height is less than its width, while providing somewhat less credit for any source whose height is greater than its width.

capricious. The Court rejected EPA's statutory argument that the Act permitted automatic credit for a height equal to the 2.5H value. Rather, the court found that the Act specified the 2.5H value as the *upper limit* of EPA's general rule authority and that EPA was authorized to define GEP at the maximum 2.5H value only if EPA had justified its choice of the maximum value as a reasoned exercise of its discretion. 719 F.2d at 457-458. The court then examined the Agency's rationales for its choice of the 2.5H value and found the Agency's choice to be arbitrary and capricious. *Id.* at 458-459.

On remand following the *Sierra Club* decision, EPA again adopted a rule providing automatic 2.5H formula credit for all sources that increased the height of their original stacks prior to October 11, 1983, the date of the *Sierra Club* decision.[10] Under the rule, sources raising the height of their original stacks after October 11, 1983 cannot rely on the 2.5H formula but must determine GEP height based on a case-by-case demonstration requirement.

EPA's rationale for allowing pre-1983 stack height increases to receive automatic 2.5H formula credit rested on one claim: that such "grandfathering" was consistent with judicially-formulated criteria for applying rules prospectively, as set forth in the *Sierra Club* decision.[11] The D.C. Circuit in the case for which review is now sought, examined EPA's "grandfather" rationale and found that the criteria set forth in *Sierra Club* were not satisfied. Accordingly, the D.C. Circuit again held EPA's automatic 2.5H formula credit approach for pre-1983 stack height increases to be arbitrary and capricious. 838 F.2d at 1244-1246, Pet. App. 36a-40a.

The only issue properly presented by the Alabama Power petition is whether the D.C. Circuit erred in holding that EPA had failed to satisfy judicially-formulated criteria for upholding "grandfather" provisions in Agency rules. This issue does not warrant review by this Court.

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[10] 50 Fed. Reg. at 27906-27907 (1985), Pet. App. 130a-132a.

[11] 50 Fed. Reg. at 27899-27900 (1985), Pet. App. 102a-103a.

ARGUMENT

The Alabama Power petition does not attempt to address the issue of whether the D.C. Circuit erred in rejecting EPA's "grandfather" rationale. Rather, the petition presents three straw man claims, all based on misreadings of what the D.C. Circuit actually decided in its 1983 and 1988 opinions.

Alabama Power's first argument is that the D.C. Circuit rejected a reasonable statutory construction by EPA, contrary to this Court's teaching. Second, Alabama Power claims that the D.C. Circuit's decision violates principles of *res judicata*. Third, Alabama Power claims the decision will have an adverse impact on administration of the Clean Air Act. All of these claims are without merit and are premised on incorrect readings of what the D.C. Circuit actually decided below.

I. ALABAMA POWER'S STATUTORY INTERPRETATION CLAIM

First, Alabama Power argues that the D.C. Circuit improperly rejected a reasonable interpretation of the statute adopted by EPA. This, Alabama Power claims, violates this Court's 1984 decision in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) ("*Chevron*"). Pet. at 18-22.

Alabama Power suggests that in its 1985 rule EPA interpreted the Act to allow automatic use of a 2.5H formula to grant credit to sources that raised their original stacks after the passage of the 1970 Clean Air Act. *Id.* However, EPA did not make this argument on remand and the D.C. Circuit did not decide this issue for the good reason that the D.C. Circuit in *Sierra Club* decision had rejected this very argument.

As discussed above, in *Sierra Club* the court held that the Act did not authorize EPA to provide automatic 2.5H formula credit for

sources that raised their stacks. 719 F.2d at 457-458. Rather, the court held that the 2.5H height was an upper limit on EPA's discretionary authority to write a general formula. *Id.* Finally, the court found that EPA had acted arbitrarily and capriciously in applying its general formulas to sources seeking credit for raising the height of their original existing stacks. *Id.* at 458-460.[12]

On remand EPA's final rule did not rely on the rejected statutory claim that the Act allows automatic 2.5H formula height credit for sources raising existing stacks. Rather, the Agency adopted a provision requiring such sources to *conduct* case-by-case demonstrations of need for a taller stack. However, the Agency exempted nearly all sources from this requirement, by allowing all pre-1983 stack height increases to receive automatic 2.5H formula credit. The agency's final rulemaking notice offered a single rationale to support this "grandfather" exemption: that it was consistent with the "retroactivity analysis" contained in *Sierra Club.*[13]

On review NRDC attacked EPA's grandfather exemption as not consistent with the retroactivity criteria set forth in *Sierra Club.* NRDC Br. at 32-35; 838 F.2d at 1243-1246, Pet. App. 37a-39a. The D.C. Circuit decided, based solely on consideration of the *Sierra Club* retroactivity criteria, that EPA had failed to justify its grandfather exemption for pre-1983 stack height increases. *Id.* at 1244-1246, Pet. App. 37a-40a.[14]

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[12] The court found the record did not support EPA's claim that its general formulas were sufficiently accurate as applied to sources raising original stacks and rejected EPA's second rationale regarding fears of "inconsistent enforcement" as nothing more than a bald, unsupported assertion. 719 F.2d at 458.

[13] 50 Fed. Reg. at 27899-27900 (1985), Pet. App. 102a-103a.

[14] The court found 1) no consistent prior rule permitting formula credit for stack height increases; 2) only limited reliance interests; and 3) significant frustration of the statutory goals resulting from the exemption. 838 F.2d at 1245-1246, Pet. App. 38a-40a.

In sum, the D.C. Circuit's decision below is not based on its adoption of a statutory interpretation conflicting with an agency's interpretation. The D.C. Circuit rejected EPA's grandfather exemption solely because EPA had failed to meet the judicially-formulated criteria for justifying prospective application of its rules. *Chevron*'s mandate to defer to reasonable agency interpretations of ambiguous statutes does not apply to this case.

The issue that Alabama Power seeks to have this Court decide -- whether the Act can be construed to permit EPA to grant automatic 2.5H credit for stack height increases -- is simply not in this case. This issue was not decided by the D.C. Circuit in its 1988 decision; it had already been litigated and decided in the Circuit's 1983 *Sierra Club* decision. Accordingly, the issue was and is *res judicata*.[15]

II. ALABAMA POWER'S *RES JUDICATA* CLAIMS

Alabama Power's second argument is that the D.C. Circuit's remand of the Agency's rules violates principles of *res judicata*. Like its first argument, this claim is based on a misreading of the D.C. Circuit's actual decisions. Alabama Power claims that in *Sierra Club* NRDC sought to invalidate use of formula credit only for stack height increases carried out *in the future* and that the *Sierra Club* decision upheld the use of the formulas for past increases. Pet. 9, 11 n.28, 23. Accordingly, Alabama Power argues, the D.C. Circuit's 1988 decision striking down EPA's grandfather treatment for such past increases violates principles of *res judicata*. *Id.* at 23-24.

Alabama Power's claim that NRDC's challenge in *Sierra Club* was limited to future stack height increases is a whole cloth

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[15] In its brief below, EPA argued that the Act does not preclude some grandfathering for stack height increase sources as a matter of law. EPA Br. at 33. The D.C. Circuit did not reject this statutory argument, deciding only that EPA's proffered support for its grandfather provision was inadequate: "We do not say there is no room for grandfathering on these facts, but the case for it seems unusually weak." 838 F.2d at 1246, Pet. App. 40a.

invention. Alabama Power cites no statement in NRDC's briefs or the court's 1983 decision drawing a distinction between past and future stack height increases.[16] No such distinction was made, either by NRDC or the court.

NRDC's position was (and is) that only stack heights in existence prior to 1970 could be grandfathered from the requirements of §123. NRDC in the 1983 case sought to invalidate EPA's general "GEP" formula for all sources that raised their stacks after December 31, 1970.[17]

Alabama Power provides no statement from the *Sierra Club* decision itself to support a claim that the court required demonstrations only for *future* stack height increases.[18] Nothing in the court's opinion distinguishes between past and future stack height increases. 719 F.2d at 456-460. The *Sierra Club* decision

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[16] In a footnote Alabama Power asserts that "Sierra Club and NRDC's argument was limited to *future* replacement stacks" and cites to our 1982 brief. Pet. 11 n.28 (emphasis in original). However, nothing in the cited reference or elsewhere in our 1982 pleadings states or implies that our challenge was limited to future stack height increases. To the contrary, our position was that no source could lawfully receive automatic 2.5H formula credit for raising an *existing* stack since the original height of such existing stacks was presumptively GEP. Brief of Sierra Club, *et al.*, in *Sierra Club* at 28.

[17] In *Sierra Club* the Sierra Club and NRDC argued that EPA could not lawfully apply its general 2.5H formula to *existing* stacks that were increased in height. See Brief of Sierra Club, *et al.* at 27-30. Sierra Club and NRDC argued further that only stack heights constructed prior to December 31, 1970 were *existing* stacks under §123. *Id.* at 47-52 *and see* Sierra Club and NRDC Reply Brief in *Sierra Club* at 26-31.

[18] Alabama Power cites to 719 F2d at 459-460 as authority for its assertion that *Sierra Club* was restricted to future stack height increases. Pet. 11 n.28. However, nothing on those pages or elsewhere states that the court's ruling applied only to future increases. The court's rationale for its holding also conflicts with any such reading. The court found that the fact that "an existing stack was built to less than- formula-height" created a presumption that the existing stack was in fact GEP. 719 F.2d at 459. This conclusion obviously applies to all existing stacks raised after the Act's December 31, 1970 grandfather date and not just to those raised following the court's 1983 decision.

correctly described NRDC's objection as covering EPA's failure to require demonstrations "whenever a facility sought to raise an existing stack." *Id.* at 456.[19]

Similarly, in the case below the D.C. Circuit did not accept Alabama Power's unsupported claim that NRDC's challenge in *Sierra Club* was restricted to future stack height increases. In describing NRDC's 1982 challenge the court correctly stated that the environmental petitioners had challenged EPA's failures to require demonstrations "when a source raised a preexisting stack." 838 F.2d at 1239, Pet. App. 25a.

In sum, Alabama Power's real dispute with the D.C. Circuit is that the court did not agree with Alabama Power's unjustified assertion that the *Sierra Club* decision was limited to future stack height increases. Certiorari is not warranted to question the D.C. Circuit's reading of the scope of its own prior decision.

Alabama Power's next *res judicata* claim rests on its assertion that the 1983 *Sierra Club* decision authorized EPA to apply its 2.5H formula to all pre-1979 stacks including pre-1979 stack height increases. Pet. 23-24. Alabama Power misreads the *Sierra Club* decision and its petition ignores the fact that in the case below the D.C. Circuit did not accept this reading of the *Sierra Club* decision. 838 F2d at 1244-1245, Pet. App. 36a-37a.

The *Sierra Club* court did not uphold use of the 2.5H formula for sources *increasing* their stacks prior to 1979. In *Sierra Club* the

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[19] In its proposed and final rules EPA did not claim that the court's 1983 decision applied only to future stack height increases. Rather in its proposed rule EPA argued that it had found the formula to be sufficiently accurate to justify its use for past and future stack height increases alike. 49 Fed. Reg. at 44883 (1984), Pet. App. 156a. In its final rule, following major comments from NRDC attacking the accuracy of its formulas, EPA abandoned the proposal's rationale and crafted an exemption for pre-1983 stack height increases based on administrative "retroactivity principles." 50 Fed. Reg. at 27899-27900 (1985), Pet. App. 102a-103a. EPA did not contend in its final rulemaking notice that the 1983 *Sierra Club* decision applied only to future stack height increases.

court distinguished two groups of sources: those sources entitled to use one of two general formulas (2.5H and H+1.5L) and those sources not entitled to use either formula. The court found that sources increasing their original stack heights were not entitled to use either of the two formulas and instructed EPA on remand to consider requiring all such sources to conduct case-by-case demonstrations. 719 F.2d 456-460. Thus, "stack-height-increase" sources were not included in the court's subsequent discussion of EPA's authority to use the 2.5H formula as a substitute for the H + 1.5L formula. 719 F.2d at 467-468. Since the court had already decided that EPA had failed to justify use of either formula for sources raising original stacks, its holding that EPA could use the 2.5H formula *in lieu of* the H+1.5L formula for certain pre-1979 stacks simply did not apply to sources that raised their original stacks.

In the decision below, the D.C. Circuit confirmed the above reading of *Sierra Club*, pointing out that the *Sierra Club* court found that EPA had "not considered whether the formulas were an accurate enough measure ... to justify dispensing with a demonstration requirement ..." for sources raising preexisting stacks. 838 F.2d at 1239, Pet. App. 25a. The D.C. Circuit went on to reject EPA's claim that employing a demonstration requirement was voluntary, holding that this requirement could be viewed as voluntary "only if EPA had set out thoroughly to validate its H+ 1.5L formula. This it did not really purport to do...." *Id.* at 1244, Pet. App. 36a.

In short, the D.C. Circuit rejected Alabama Power's claim that the *Sierra Club* decision allowed sources with pre-1979 stack height increases to use the formulas without any need for EPA to justify the validity of those formulas for such sources. As before, Alabama Power's basis for seeking review reduces to the fact that Alabama Power disagrees with the D.C. Circuit's interpretation of its prior decision in *Sierra Club*. As shown above, the D.C. Circuit's interpretation of *Sierra Club* is clearly correct. Moreover, the issue

whether the D.C. Circuit has correctly interpreted its prior decision does not warrant review by this Court.[20]

III. ALABAMA POWER'S CLAIM OF ADVERSE ADMINISTRATIVE IMPACT

Finally, Alabama Power argues that the D.C. Circuit's decision will have an adverse impact on administration of the Act, suggesting that the decision requires EPA to impose case-by-case wind tunnel demonstration requirements and a "multilayer grandfathering scheme" for all post-1970 stack height increases. Pet. 25. The D.C. Circuit decision does not require this result.

The decision allows EPA to establish GEP for stack height increases by one of several paths. First, the Agency retains the option of developing a general formula for such sources that more accurately reflects the stack height needed to avoid excessive concentrations under §123. 838 F.2d at 1239, Pet. App. 25a. Second, EPA can attempt to thoroughly validate one of its current general formulas as applied to such sources. This the court found EPA had failed to do on remand. *Id.* at 1244, Pet. App. 36a. Third, the court left EPA room for the agency to craft more narrowly framed "grandfather" provisions if the agency could demonstrate that such provisions satisfied judicial retroactivity criteria. *Id.* at 1246, Pet. App. 40a.

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[20] Alabama Power suggests there is a need for this Court to clarify the application of the doctrines of "law of the case" and *res judicata*, and that there is a confusion in the D.C. Circuit as to these doctrines. Pet. 22-24. There is, however, nothing to suggest any such "confusion" in the D.C. Circuit. Alabama Power cites no cases in the D.C. Circuit, or any other circuit which are inconsistent with the holding below. Furthermore, this Court has on several recent occasions addressed at length the application of these doctrines. *Arizona v. California*, 460 U.S. 605, 618-628 (1983); *Nevada v. United States*, 463 U.S. 110, 128-144 (1983); *United States v. Mendoza*, 464 U.S. 154, 157-164 (1984); *United States v. Stauffer Chemical*, 464 U.S. 165, 169-174 (1984). Given the incorrect factual premise of Alabama Power's claim and the wealth of precedent from this Court which already exists, this case is not an appropriate subject for this Court's time and attention.

Finally, even when case-by-case demonstrations are required, nothing in the court's decision requires EPA to insist that such demonstrations be conducted in wind tunnels or in field studies if these options are impracticable. As NRDC pointed out in the case below, EPA has developed mathematical models that are capable of analyzing the downwash potential of individual sources on a case-by-case basis.[21]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[21] Reply Brief of NRDC, *et al.*, in *NRDC v. Thomas, supra.*

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